No. 97-1006

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1997

CHURCH OF SCIENTOLOGY INTERNATIONAL, BOWLES & MOXON, AND CHURCH OF SCIENTOLOGY OF ILLINOIS,
Petitioners,

v.

CULT AWARENESS NETWORK, *Respondent*.

On Petition For A Writ of Certiorari To The Supreme Court of Illinois

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under 28 U.S.C. § 1257(a) to review a non-final decision of the Supreme Court of Illinois in which that court reversed the dismissal of the complaint, declined to consider the only federal issue in the case, and remanded the case for further proceedings in the state trial court.

2. Whether this Court should avoid deciding the federal constitutional question presented by petitioners, when that question has not been finally decided by the Supreme Court of Illinois and may become moot depending on the outcome of the case on remand in the state courts.

3. Whether instigating and maintaining over 20 meritless civil suits, with malice and without probable cause, for the purpose of harassing and eliminating a competitor in the marketplace of ideas — as set forth in the allegations of the complaint (which must be accepted as true at this stage of the case) — constitutes protected activity under the First Amendment.

RULE 29.6 STATEMENT

Respondent Cult Awareness Network has no parent companies or subsidiaries to list pursuant to Supreme Court Rule 29.6.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT 1

A. Nature of the Case. 2

B. The Underlying Lawsuits 4

C. The State Court Proceedings 6

1. Circuit Court of Cook County 6

2. Appellate Court of Illinois 6

3. Supreme Court of Illinois 7

REASONS FOR DENYING THE PETITION 8

I. THIS COURT LACKS JURISDICTION OVER THE NON-FINAL DECISION OF THE SUPREME COURT OF ILLINOIS 10

TABLE OF CONTENTS—Continued

Page

A. 28 U.S.C. § 1257(a) Limits This Court's Jurisdiction To Review State Court Decisions To Final Judgments Of A State's Highest Court 10

B. Any Effort To Invoke An Exception To The Finality Requirement Would Be Futile Because The Supreme Court Of Illinois Did Not Finally Determine The Federal Issue Presented In The Petition 13

C. Even If The Supreme Court Of Illinois Had Finally Decided The Federal Issue, None Of The *Cox* Exceptions To The Finality Rule Would Apply 15

II. THE DOCTRINE OF AVOIDING UNNECESSARY OR PREMATURE ADJUDICATION OF CONSTITUTIONAL QUESTIONS ALSO SUPPORTS DENIAL OF THE PETITION 17

III. THE FIRST AMENDMENT DOES NOT PROTECT THE ACTIVITIES ALLEGEDLY UNDERTAKEN BY THE DEFENDANTS IN ANY EVENT 19

CONCLUSION 25

TABLE OF AUTHORITIES

Cases: *Page*

Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) 23

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) 9, 18

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) 20, 22, 23

Bryson v. News America Publications, Inc., 174 Ill. 2d 77, 672 N.E.2d 1207 (1996) 22

California v. *Stewart*, 384 U.S. 436 (1966) 16

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 20, 23, 24

Church of Scientology of California v. Wollersheim, 49 Cal. Rptr. 2d 620 (App. 1996) 3

City of Tarrant v. Jefferson, 682 So. 2d 29 (Ala. 1996) 12

Clark v. Kansas City, 172 U.S. 334 (1899) 12

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 13-17

Flynt v. Ohio, 451 U.S. 619 (1981) 13

Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466 (7th Cir. 1982) 21

TABLE OF AUTHORITIES—Continued

Page

Hart v. Cult Awareness Network, 16 Cal. Rptr. 2d 705 (App. 1993) 3

Hathorn v. Lovorn, 457 U.S. 255 (1982) 12

In re Primus, 436 U.S. 412 (1978) 21

Jefferson v. City of Tarrant, 118 S. Ct. 481 (1997) 8-14

Lyng v. Northwest Indian Cemetery Protective Ass'n., 485 U.S. 439 (1988) 18

Market Street R. Co. v. Railroad Comm'n, 324 U.S. 548 (1945) 11

McComb v. Commissioners, 91 U.S. 1 (1875) 12

Meagher v. Minnesota Thresher Mfg. Co., 145 U.S. 608 (1892) 12

Mills v. Alabama, 384 U.S. 214 (1966) 15

Minnick v. California Dept. of Corrections, 452 U.S. 105 (1981) 18

Missouri & K. I. R. Co. v. Olathe, 222 U.S. 185 (1911) 11

New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) 18

TABLE OF AUTHORITIES—Continued

Page

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973) 11

O'Dell v. Espinoza, 456 U.S. 430 (1982) 12

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 23

Pope v. Atlantic Coast Line R. Co., 345 U.S. 379 (1953) 11, 15

Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993) 23, 24

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 11

Religious Technology Center v. Scott, 1996 WL 171443 (9th Cir. Apr. 11, 1996) 4

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948) 18

Rescue Army v. Municipal Court, 331 U.S. 549 (1947) 18

USS-Posco Indus. v. Contra Costa County Building & Constr. Trades Council, 31 F.3d 800 (9th Cir. 1994) 24

TABLE OF AUTHORITIES—Continued

Page

Wright v. DeArmond, 977 F.2d 339 (7th Cir. 1992) 20

Statutes and Rules:

28 U.S.C. § 1257(a) 1, 9, 11, 13

Miscellaneous:

Constitution of the United States, First Amendment . . . . . *passim*

J. P. Kumar, *"Fair Game": Leveling the Playing Field in Scientology Litigation*, 16 REV. LITIG. 747, 749-50 (1997) 4

Restatement (Second) of Torts § 674 . . . . . 7, 17

Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* 106 (7th ed. 1993) 12, 13

BRIEF FOR CULT AWARENESS NETWORK IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Illinois (Pet. App. 1a-18a) is reported at 177 Ill. 2d 267, 685 N.E.2d 1347 (1997). The opinion of the Appellate Court of Illinois (Pet. App. 19a-34a) is reported at 279 Ill. App. 3d 66, 664 N.E.2d 217 (1st Dist. 1996). The orders of the Circuit Court of Cook County (Pet. App. 35a-42a) are unreported.

JURISDICTION

The opinion of the Supreme Court of Illinois was issued on September 18, 1997. The petition for writ of certiorari was filed on December 16, 1997. Petitioners purport to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a), but as explained in detail below, this Court lacks jurisdiction to review the interlocutory order of the Supreme Court of Illinois — that court reversed the dismissal of respondent's complaint, declined to address the merits of petitioners' First Amendment defense because it was premature, and remanded for further proceedings in the state trial court. Pet. App. 18a.

STATEMENT

This is an action governed by Illinois law alleging a conspiracy to maliciously prosecute more than 20 meritless civil suits, against a small, not-for-profit organization and its affiliates, in several jurisdictions across the country. As the Supreme Court of Illinois noted, because defendants "challenged plaintiff's complaint by way of a * * * motion to dismiss," Pet. App. 17a, the allegations of the complaint (R. C74-106, R. C212-231) must be taken as true at this stage of the proceedings. Pet. App. 1a.

A. Nature of the Case

According to the complaint, defendants — Church of Scientology International, Church of Scientology Illinois, and Bowles & Moxon, a Los Angeles law firm — conspired with each other, with certain individual Scientology members, and with others to commence and prosecute a series of unfounded lawsuits against the Cult Awareness Network ("CAN"), a small, not-for-profit organization dedicated to educating the public as to religious rights, freedoms, and responsibilities, and its affiliates for the purpose of achieving a number of illicit ends unrelated to the merits of the defendants' purported claims. R. C213, R. C227-228. Specifically, by maintaining at least 21 baseless actions against CAN and its affiliates, defendants sought to impede CAN's efforts to provide public education regarding cult organizations, to drive CAN into bankruptcy, and to squelch CAN's anti-cult message. R. C213, C229, C230. As a result of these lawsuits, CAN's members, officers, and employees have been forced to devote an inordinate amount of their time and to expend an exorbitant percentage of CAN's limited resources defending against these meritless claims. *Ibid.*

To generate this flood of unfounded litigation, defendants suggested, instigated, encouraged, assisted, and financed lawsuits brought in the names of certain nominal "plaintiffs" — individual members of the Church of Scientology. R. C228. Defendants also provided office space and boilerplate pleadings to facilitate the filing of these vexatious lawsuits, most of which alleged the same factually and/or legally deficient civil rights claims, and all of which were resolved in CAN's favor. R. C228-229.

As evidenced in the findings of a California court in one of the underlying actions, these lawsuits appear to have their genesis in a February 1991 edict of the Church of Scientology "identif[ying] CAN as a suppressive group,

which Church literature defines as 'one that actively seeks to suppress or damage Scientology or a Scientologist by Suppressive Acts.'" *Hart v. Cult Awareness Network*, 16 Cal. Rptr. 2d 705, 707 (App. 1993). The *Hart* Court further noted that "[a]ccording to Church literature, a suppressive person or group becomes 'fair game,' and a person or group which is fair game 'May be deprived of property or injured by any means by any Scientologist without any discipline of the Scientologist. May be tricked, sued or lied to or destroyed.'" *Ibid.*

And, indeed, between 1992 and 1994 a relentless barrage of lawsuits, all of which are alleged to have been meritless, was brought against CAN at the behest of the defendants in the names of various individual Scientologists.[1/]

[1/] CAN has not been the sole target of the Scientology litigation factory. In 1996, for example, a California court found that "the history of the underlying litigation reveals that the instant action is consistent with a pattern of conduct by the Church to employ every means, regardless of merit, to frustrate or undermine Wollersheim's petition activity." *Church of Scientology of California v. Wollersheim*, 49 Cal. Rptr. 2d 620, 632 (App. 1996). As the *Wollersheim* Court noted, among other tactics employed during the fifteen years of litigation, Scientology asked the Ninth Circuit "to disqualify the entire United States District Court for the Central District of California. In an unprecedented ruling the Ninth Circuit struck the motion from its records." *Id.* at 624. The Court further described the Church as having "continuously and unsuccessfully use[d] the litigation process to bludgeon the opponent into submission." *Id.* at 632. And, in an even more recent case in which petitioner Church of Scientology International was a co-plaintiff, the Ninth Circuit affirmed an (continued...)

This is not, therefore, an instance of a single (even meritless) lawsuit begetting a retaliatory lawsuit. Rather, defendants have attempted to smother a small competitor in the marketplace of ideas under the weight of more than a score of frivolous lawsuits.

B. The Underlying Lawsuits

As alleged in the complaint, defendants have instigated the filing of at least 21 actions against CAN and its affiliates in state and federal courts in seven jurisdictions across the United States, including Illinois. R. C213-227. The vast majority of these lawsuits claimed that CAN had violated federal or state civil rights laws by refusing to permit individual members of the Church of Scientology to join CAN or attend CAN meetings, or refusing to recognize Scientology-established organizations as CAN affiliates. R. C214-217, C218-227. Two additional suits alleged

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(...continued)
award of almost $2.9 million in attorneys' fees against plaintiffs, quoting the special master's finding that plaintiffs' complaints had been brought "in bad faith to harass the individual defendants and destroy [a church comprising a splinter group of Scientology] through massive over-litigation and other highly questionable litigation tactics." *Religious Technology Center v. Scott*, 1996 WL 171443, at *5 (9th Cir. Apr. 11, 1996). See also J. P. Kumar, *"Fair Game": Leveling the Playing Field in Scientology Litigation*, 16 REV. LITIG. 747, 749-50 (1997) (noting that "the most obvious feature of the Church of Scientology's use of the legal system is the sheer volume of litigation initiated by the Church in both offensive and defensive situations," and that the "principal goals" of this tactic "are to delay the final resolution of the matter for as long as possible, thereby depleting the resources and stamina of an opponent").

intentional torts under state law. One suit claimed that CAN fraudulently induced a Scientologist into performing volunteer activities. R. C213-214. The other lawsuit purported to state a cause of action for intentional infliction of emotional distress and fraudulent misrepresentation for CAN's alleged refusal to permit a Scientologist to attend CAN's annual meeting. R. C217-218.

CAN was the prevailing party in all of these lawsuits. R. C213-227. The various courts granted CAN's motions for summary judgment in five cases, granted motions to dismiss in four more cases, dismissed ten other cases with prejudice, and permitted voluntary dismissals by the individual Scientologists in two cases. *Ibid.* Most of the civil rights claims were decided in favor of CAN on the obvious ground that CAN, a private organization and not a place of public accommodation, is not governed by the applicable civil rights laws. See, *e.g.*, R. C215-217, C218, C220, C226. Moreover, in securing a voluntary dismissal, the nominal plaintiff in one suit even admitted that "the lawsuit is without foundation in fact and was instigated by the Church of Scientology." R. C214. Two other suits similarly were utterly lacking in factual support; in both instances, Scientologists brought suit alleging that CAN had discriminated against them in denying them membership even though neither nominal plaintiff had even bothered to apply for such membership prior to instituting legal action. R. C214-215, C226.[2/]

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[2] In their statement of the case, petitioners have presented "facts" that are wholly at odds with the allegations of the complaint. For example, without citation to the record, petitioners state that CAN has targeted Scientology as a cult and that in an effort to bring balance and fairness to

(continued...)

C. The State Court Proceedings

1. Circuit Court of Cook County. In 1994, CAN filed the instant suit. R. C3. In its second amended complaint, which is the pleading at issue here, CAN alleged that defendants Church of Scientology International, Bowles & Moxon, and Church of Scientology Illinois had conspired to engage in malicious prosecution. R. C227-230. Before the parties conducted any discovery, the trial court dismissed CAN's complaint for failure to state a claim under then-existing Illinois law. Pet. App. 35a-42a.

2. Appellate Court of Illinois. The Appellate Court affirmed the dismissal of CAN's complaints. The court reasoned that CAN's allegations did not satisfy two elements required to state a claim for malicious prosecution under Illinois law: (1) the underlying litigation must have been favorably terminated in the malicious prosecution plaintiff's favor, and (2) the plaintiff must have suffered special damages in defending against the underlying suits. Pet. App. 19a-34a. In regard to the former, the court held that the voluntary and involuntary dismissals, dismissals for failure to state a cause of action, and summary judgments obtained by CAN did not satisfy the Illinois favorable termination standard, which required a judicial determination that "deals with the *factual* issue or issues of a case." *Id.* at 25a (emphasis in original). With respect to the latter, the

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[2](...continued)
CAN's educational efforts, a number of Scientology parishioners attempted to join CAN and then filed test cases challenging CAN's refusal to admit them as members. Pet. 3. None of this is in the complaint. In view of the procedural posture of the case, these assertions are not properly before this Court and must be disregarded.

court held that the damages alleged by CAN constituted the ordinary harm generated from any legal action. *Id.* at 29a.

3. Supreme Court of Illinois. The Illinois Supreme Court reversed and remanded the cause to the circuit court for further proceedings. Pet. App. 1a-18a. In analyzing the favorable termination requirement, the court found that the approach followed in recent decades by the Illinois appellate courts was "at odds with modern tort law," *id.* at 8a, and proceeded to adopt the approach of the Restatement (Second) of Torts § 674. *Id.* at 11a. Then, applying the Restatement approach to CAN's complaint, the court found that CAN had adequately alleged the favorable termination of the underlying actions. *Id.* at 12a.

The court also concluded that CAN had sufficiently pled special damages:

> "[T]he present case involves allegations that a large national corporation improperly induced its members to engage in a national campaign of simultaneous malicious prosecution. Plaintiff has alleged that the Church of Scientology instituted the simultaneous suits, not to resolve any legal dispute between the parties, but to keep plaintiff from engaging in its business of disseminating information regarding religious freedom. The invidiousness of the alleged conspiracy is best reflected in the fact that plaintiff was sued 21 times over the course of a 17-month period in jurisdictions ranging from New York to California. Such a sustained onslaught of litigation can hardly be deemed 'ordinary' if plaintiff can prove that the actions were brought without probable cause and with malice. In view of these circumstances, we believe that plaintiff has set forth facts, which if proved true, satisfy our special injury rule."

Pet. App. 16a-17a.

Finally, the court briefly touched upon defendants' First Amendment argument, noting that while the Constitution "affords protection to the *honest* litigator in search of resolutions to *true* legal disputes," it "does not provide the right to any individual to assist another, with money or otherwise, in the prosecution of a suit which has been filed with malice and without probable cause." Pet. App. 17a (emphasis in original). The court then held that because defendants "challenged plaintiff's complaint by way of a * * * motion to dismiss * * * defendants' constitutional argument, which is a fact-dependent defense to the action * * * *cannot be considered* in the context of the present motion to dismiss." *Id.* at 17a-18a (emphasis added). The court added, however, that "[n]othing in our opinion prevents defendants from raising the first amendment's protections at the appropriate juncture in this case." *Id.* at 18a.

In sum, although the court stressed that "[a]n action for malicious prosecution remains one that is disfavored in law," Pet. App. 18a, it concluded that CAN had sufficiently alleged the elements of the tort under Illinois law. *Ibid.* Accordingly, the court "reverse[d] the judgments of the appellate and circuit courts, and remand[ed] the matter to the circuit court for further proceedings consistent with this opinion." *Ibid.*

REASONS FOR DENYING THE PETITION

The question presented in the petition plainly does not warrant this Court's review for several reasons. The most obvious of these reasons is that the Court lacks jurisdiction. Under well-settled principles, addressed most recently in *Jefferson v. City of Tarrant*, 118 S. Ct. 481 (1997), the decision of the Supreme Court of Illinois is not reviewable by this Court because the Illinois high court did not render

a "[f]inal judgment[] or decree[]," as required to invoke this Court's jurisdiction under 28 U.S.C. § 1257(a). All that the Supreme Court of Illinois did in the decision sought to be reviewed was to reverse the dismissal of a complaint and remand the case to the state trial court "for further proceedings consistent with this opinion." Pet. App. 18a. Its order thus was "avowedly interlocutory," *Jefferson*, 118 S. Ct. at 486, and cannot be reviewed by this Court at this time.

Moreover, because the state supreme court has not even considered — let alone "finally determined" — the federal issue raised by petitioners, none of the exceptions recognized by this Court to the "firm final judgment rule," *Jefferson*, 118 S. Ct. at 485-86, could possibly apply in this case. Nor would any of these exceptions apply had the Supreme Court of Illinois actually decided the federal issue. In short, given the procedural posture of the case, there is absolutely no basis for review in this Court of the question presented.

Even if this Court had jurisdiction, the petition should be denied as premature for prudential reasons. One of the most fundamental and deeply rooted canons of constitutional adjudication is the principle that this Court will not "decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). This case presents a clear occasion for application of this self-imposed principle of judicial restraint. In its opinion, the Supreme Court of Illinois expressly stated that the federal constitutional question raised by petitioners "*cannot be considered* in the context of the present motion to dismiss." Pet. App. 18a (emphasis added). The court then expressly invited petitioners to raise their First Amendment defense on remand "at the appropriate juncture in this case," *ibid.*, at which time the issue presented in this petition will become moot if

petitioners prevail. It is difficult to conceive of circumstances in which a question presented to this Court in a petition for writ of certiorari would be more patently premature.

Finally, even apart from the insurmountable jurisdictional and prudential obstacles noted above, the Court should not hear this case because the factual premise upon which the petition is based is fictitious. Petitioners chose to attack the complaint in a motion to dismiss. Accordingly, the allegations set forth in the complaint must be accepted as true at this stage of the case. Those allegations charge petitioners with instigating and maintaining over 20 meritless civil suits, with malice and without probable cause, for the purpose of harassing and eliminating a competitor in the marketplace of ideas. This Court's decisions make clear that such activities, if proven to be true, are not entitled to protection under the First Amendment. The petition, however, essentially ignores the complaint's allegations, substituting instead the petitioners' view of the facts. That is impermissible. Petitioners will have an opportunity to contest CAN's allegations on remand, but for now the Court must accept as true the complaint's allegations that petitioners have engaged in a pattern of filing vexatious lawsuits against CAN. And it is clear under this Court's decisions that this sort of abuse of the judicial system is not protected by the Constitution.

I. THIS COURT LACKS JURISDICTION OVER THE NON-FINAL DECISION OF THE SUPREME COURT OF ILLINOIS.

A. 28 U.S.C. § 1257(a) Limits This Court's Jurisdiction To Review State Court Decisions To Final Judgments Of A State's Highest Court.

In *Jefferson v. City of Tarrant*, 118 S. Ct. 481 (1997), a decision issued one week before the instant petition was

filed, this Court reiterated the longstanding rule that it lacks jurisdiction over interlocutory rulings of state supreme courts. As the Court explained, "Congress has limited our review of state-court decisions to '[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had.'" *Id.* at 484 (quoting 28 U.S.C. § 1257(a)). This provision, the Court continued, "establishes a firm final judgment rule" that "'is not one of those technicalities to be easily scorned.'" *Id.* at 485, 486 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). Rather, "'[i]t is an important factor in the smooth working of our federal system,'" *id.* at 486, that serves several ends:

> "(1) it avoids piecemeal review of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; [and] (3) it limits review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs."

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 159 (1973).

Under section 1257(a), a state court decision is not reviewable by this Court unless it is final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market Street R. Co. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945). In short, "[i]t must be the final word of a final court." *Ibid.* This Court has consistently recognized, with rare exceptions described below, that "the overruling of a demurrer, like the issuance of a temporary injunction, is not a 'final' judgment." *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 382 (1953); see

also *Missouri & K. I. R. Co. v. Olathe*, 222 U.S. 185 (1911); *Clark v. Kansas City*, 172 U.S. 334 (1899); *Meagher v. Minnesota Thresher Mfg. Co.*, 145 U.S. 608, 610-11 (1892); *McComb v. Commissioners*, 91 U.S. 1 (1875). As the leading Supreme Court treatise has summarized,

> "In civil litigation, the judgment of the highest state court relating to a demurrer or motion to dismiss a complaint is final only if the case is thereby disposed of conclusively. Thus, *where a dismissal of the suit has not been ordered*, or where leave to amend or answer over has been granted, finality has been found lacking."

Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* 106 (7th ed. 1993) (emphasis added).

Here, as in *Jefferson*, the decision of the state supreme court reversing the trial court's dismissal of CAN's complaint "was not a 'final judgment,'" but was instead "avowedly interlocutory." 118 S. Ct. at 486. The Supreme Court of Illinois, in words almost identical to those used by its Alabama counterpart in *Jefferson*, "remand[ed] the matter to the circuit court for further proceedings consistent with this opinion." Pet. App. 18a. Compare *City of Tarrant v. Jefferson*, 682 So. 2d 29, 31 (Ala. 1996) (remanding "for further proceedings consistent with this opinion"). Thus, as in *Jefferson*, "[a]bsent settlement or further dispositive motions, the proceedings on remand will include a trial on the merits of the state-law claims." 118 S. Ct. at 486; see also *O'Dell v. Espinoza*, 456 U.S. 430, 430 (1982) (per curiam) ("Because the Colorado Supreme Court remanded this case for trial, its decision is not final 'as an effective determination of the litigation'"); cf. *Hathorn v. Lovorn*, 457 U.S. 255, 262 (1982) (observing that decision of Mississippi Supreme Court "plainly did not appear final at the time it

was rendered" where Court remanded case "for further proceedings not inconsistent with [its] opinion"). In these circumstances, this Court lacks jurisdiction over the decision of which petitioners seek review, and the petition should be denied.

B. Any Effort To Invoke An Exception To The Finality Requirement Would Be Futile Because The Supreme Court Of Illinois Did Not Finally Determine The Federal Issue Presented In The Petition.

While the "firm final judgment rule" is "not * * * to be easily scorned," *Jefferson*, 118 S. Ct. at 485-86, this Court recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), "four categories of * * * cases in which the Court has treated the [state court] decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Id.* at 477.[3] Significantly, however, these four categories of cases all involve "situations in which the highest court of a State has *finally determined the federal issue present in a particular case*." *Ibid.* (emphasis added); see also *Flynt v. Ohio*, 451 U.S. 619, 621 (1981) (noting that "in most, if not all, of the cases falling within the four exceptions, not only was there a final judgment on the federal issue for purposes of state-court proceedings, but also there were no other federal issues to be resolved").

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[3] In post-*Cox* cases, this Court has suggested that these exceptions, particularly the fourth exception, should be narrowly construed, so as not to "swallow the rule" requiring a final judgment. See *Flynt v. Ohio*, 451 U.S. 619, 622 (1981); see also Stern et al., *supra*, at 104.

Here, petitioners cannot even demonstrate that the Supreme Court of Illinois has "finally determined the federal issue presented" in this case, let alone satisfy the criteria for invoking any of the specific *Cox* exceptions. Indeed, the Supreme Court of Illinois has not even decided the federal issue *once* — it specifically declined, at this stage of the litigation, to rule on the merits of the federal question that petitioners have asked this Court to review. The Illinois high court did acknowledge the decisions of this Court upon which defendants relied (and cite here, too), but "dispute[d] the defendants' reliance upon them" given the allegations here. Pet. App. 17a. As the court observed, while the Constitution "affords protection to the *honest* litigator in search of resolutions to *true* legal disputes," it "does not provide the right to any individual to assist another, with money or otherwise, in the prosecution of a suit which has been filed with malice and without probable cause." *Ibid.* But given the procedural posture of this case, the court did not decide the issue. To the contrary, because defendants "challenged plaintiff's complaint by way of a * * * motion to dismiss," the court expressly held that defendants' "constitutional argument, which is a fact-dependent defense to the action * * * *cannot be considered* in the context of the present motion to dismiss." *Id.* at 17a-18a (emphasis added). Then, to underscore the fact that further proceedings in the state trial court "could effectively moot the federal-law question," *Jefferson*, 118 S. Ct. at 486, the court added that "[n]othing in our opinion prevents defendants from raising the first amendment's protections at the appropriate juncture in this case." Pet. App. 18a. In sum, then, because the federal issue raised by petitioners has not been decided at all by the Illinois Supreme Court — let alone "finally decided" — petitioners cannot invoke any of the *Cox* exceptions to the finality rule for state court judgments.

C. Even If The Supreme Court Of Illinois Had Finally Decided The Federal Issue, None Of The *Cox* Exceptions To The Finality Rule Would Apply.

Moreover, even if the Supreme Court of Illinois had finally decided the First Amendment issue raised by defendants, none of the *Cox* exceptions would apply in any event.

The first category includes "cases in which * * * the federal issue is conclusive or the outcome of further proceedings preordained." *Cox*, 420 U.S. at 479. As an example of this type of case, the *Cox* Court cited *Mills v. Alabama*, 384 U.S. 214, 217-18 (1966), in which the finality rule was overlooked because "the appellant had no defense other than his federal claim and could not prevail at trial on the facts or any nonfederal ground." *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379 (1953), also falls within this category. There, the Court took jurisdiction over a state court judgment that "ordinarily" would not have been considered final because the petitioner was "both explicit and free with his concession that his case rests upon his federal claim and nothing more." *Id.* at 382. As much as we wish this were the case here, we have received no indication that petitioners have conceded that CAN's case on the merits of the state law claims is so strong that the outcome on remand is "preordained" or that their defense rests solely on the First Amendment. Nor did the Supreme Court of Illinois suggest that the proceedings on remand are a mere formality; the court simply held that CAN has adequately *alleged* a claim for malicious prosecution, Pet. App. 18a, a very different thing from prevailing at trial on that claim.

The second category encompasses cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the

outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. In such cases, "[n]othing * * * short of settlement of the case, would foreclose or make unnecessary decision on the federal question." *Ibid.* Application of this exception also is plainly foreclosed by the Illinois high court's statement that "[n]othing in our opinion prevents defendants from raising the first amendment's protections at the appropriate juncture in this case." Pet. App. 18a. In other words, the federal question raised in the petition might become moot if defendants prevail on remand either on state law grounds or on their First Amendment defense.

The third category involves "situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox*, 420 U.S. at 481. The paradigmatic example is *California* v. *Stewart*, 384 U.S. 436, 498 n.71 (1966), in which this Court "explain[ed] that the state judgment was 'final' since an acquittal of the defendant at trial would preclude, under state law, an appeal by the State." *Cox*, 420 U.S. at 481. This exception also does not apply here. The First Amendment issue remains open for consideration by the Illinois courts on remand from the Supreme Court of Illinois, and if it is not mooted in the course of those proceedings, it will be ripe for consideration by this Court after a final decision has been rendered.

Finally, the fourth *Cox* exception also would not apply either. This exception may be invoked where "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action" and "refusal immediately to review the state-court decision might seriously erode federal policy." *Cox*, 420 U.S. at 482-83. This Court, in fact, relied on this exception in finding jurisdiction over a decision of the Georgia Supreme Court in *Cox* itself. In doing so, the Court observed that the state

court decision was "plainly final on the federal issue" and "even if appellants prevailed at trial and made unnecessary further consideration of the constitutional question, *there would remain in effect the unreviewed decision* of the State Supreme Court" upholding "a statute the constitutionality of which is in serious doubt." *Id.* at 485-86 (emphasis added).

There are no such concerns here. In its opinion reinstating CAN's complaint, the Supreme Court of Illinois simply did not render a decision of any kind on the merits of petitioners' First Amendment defense. The absence of a ruling from the Illinois high court on this issue means that there is no precedent at all in need of review (and correction).

Moreover, it is by no means clear that a decision on remand in petitioners' favor on the First Amendment question "would be preclusive of any further litigation" on CAN's cause of action. Illinois has no obligation to require special damages as an element of a malicious prosecution claim. If the Illinois courts were to decide that the special damage requirement infringed upon activity protected by the First Amendment, they would be free to redefine that element, or to eliminate it altogether as a majority of states have done. See Reporter's Note to Appendix, Restatement (Second) of Torts § 674, at 438 (1981) (noting that the "clear and growing majority" of thirty states follow the "American" rule which does not require special damages).

II. THE DOCTRINE OF AVOIDING UNNECESSARY OR PREMATURE ADJUDICATION OF CONSTITUTIONAL QUESTIONS ALSO SUPPORTS DENIAL OF THE PETITION.

Even if the statutory limitations on this Court's jurisdiction did not impose an absolute bar on review of this case, the petition should be denied pursuant to the closely related prudential doctrine that the Court will not "decide

questions of a constitutional nature unless absolutely necessary to a decision of the case." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). This doctrine has been described as a "fundamental and long-standing principle of judicial restraint," *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988), that is "more deeply rooted than any other in the process of constitutional adjudication." *New York City Transit Authority v. Beazer*, 440 U.S. 568, 582 (1979). Although the doctrine has been developed by this Court "for its own governance in * * * cases confessedly within its jurisdiction," *Ashwander*, 297 U.S. at 346 (Brandeis, J., concurring), it bears a "close connection" to the constitutional and statutory "limitations on [the Court's] jurisdiction." *Minnick v. California Dept. of Corrections*, 452 U.S. 105, 122 n.30 (1981). See also *Rescue Army v. Municipal Court*, 331 U.S. 549, 571 (1947) (explaining that "some if not all" of the "ultimate foundations" for the policy of avoiding the premature adjudication of constitutional issues "also sustain the jurisdictional limitation[s]" on the Court).

In view of the important policies at stake when the jurisdictional and prudential restraints on the Court converge, a petitioner bears a higher "burden of affirmatively establishing this Court's jurisdiction" when seeking review of a federal *constitutional* issue arising out of state court litigation. See *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 67-71 (1948). As the Court has explained, the "prerequisite for the exercise of the appellate powers of this Court" of a final judgment of the highest state court "is especially pertinent when a constitutional barrier is asserted against a State court's decision on matters peculiarly of local concern." *Id.* at 67. In such circumstances, "[t]he policy against premature constitutional adjudications demands that any doubts * * * be resolved against jurisdiction." *Id.* at 71.

These principles are fully applicable here, and they provide another compelling reason for denying the petition. Petitioners raise a First Amendment issue in the context of a suit for malicious prosecution governed by Illinois law. As explained above, the Illinois courts have not rendered a final decision on either the federal or state law aspects of the action. To the contrary, petitioners have been expressly invited by the Supreme Court of Illinois to press their federal claim "at the appropriate juncture" on remand. Pet. App. 18a. And if they are successful in doing so, or if they prevail on state law grounds, the question presented in the instant petition will become moot. Where finality is so clearly lacking (in any sense of the word), consideration of a First Amendment question is entirely unwarranted.

III. THE FIRST AMENDMENT DOES NOT PROTECT THE ACTIVITIES ALLEGEDLY UNDERTAKEN BY THE DEFENDANTS IN ANY EVENT.

As demonstrated above, the jurisdictional and prudential obstacles to review of the question presented in this petition are insurmountable. But even if they were not, this would not be an appropriate case for review because petitioners' entire First Amendment claim rests upon a misapprehension of both the allegations of CAN's complaint and the scope of the constitutional right to access to the courts. Once these erroneous premises are recognized and the issues correctly framed, this Court's decisions establish beyond any doubt that the First Amendment does not protect the blatant misuse of the litigation process alleged to have taken place here.

Petitioners contend that the decision of the Supreme Court of Illinois "directly conflicts with decisions of th[is] Court and abridges the First Amendment rights of petitioners" (Pet. 1) by "expand[ing] the definition of special damages to include instances where a defendant has encouraged and coordinated a series of lawsuits to be brought

to challenge discriminatory practices." *Id.* at 13.[4/] Cloaking themselves in the mantel of the NAACP civil rights activists, petitioners claim that the court has infringed upon their right to "obtain meaningful access to the courts" through "group legal action," as recognized in "the *Button* line of cases." *Id.* at 13-15.

Like the Supreme Court of Illinois, CAN "do[es] not dispute the correctness of these Supreme Court decisions," but only with "the defendants' reliance upon them." Pet. App. 17a. It is beyond dispute that "[t]he right of access to the courts is * * * one aspect of the right of petition" under the First Amendment. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). But, as explained below, this right is not absolute; it does not extend, for example, to the institution of "a pattern of baseless, repetitive claims," *id.* at 513, or to "suits based on insubstantial claims * * * that lack * * * a 'reasonable basis.'" *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983); see also *Wright v. DeArmond*, 977 F.2d 339, 347 (7th Cir. 1992) ("While normally protected by the

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[4] Contrary to petitioners' contention, the Supreme Court of Illinois did *not* expand its conception of special damages. In fact, the Court explicitly "stress[ed] that [its] holding with respect to the special injury requirement *should not be viewed as a rejection of the rule as set forth in [its] earlier opinions*." Pet. App. 18a. As the Court explained, its holding followed from the "common theme with respect to the special injury rule which runs throughout all of this court's opinions on the subject" that the courts have a "responsibility to maintain a proper balance between the societal interest in preventing harassing suits and in permitting the honest assertion of rights in our courtrooms." *Id.* at 16a.

first amendment, the invocation of administrative or judicial proceedings may be tortious and actionable if employed for a purpose that is unlawful and is other than and in addition to the goal sought openly in the proceeding itself"); *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 472 (7th Cir. 1982) (Posner, J.) (noting that the "line" between proper and improper litigation purposes "is crossed when [plaintiff's] purpose is not to win a favorable judgment * * * but to harass [defendant], and deter others, by the process itself — regardless of outcome — of litigating").[5/]

Whether petitioners truly were pursuing legitimate test cases (as they insist), or whether the suits were instigated by the petitioners maliciously and without probable cause to drain CAN's resources and eliminate a competitor in the marketplace of ideas (as the pleadings allege), cannot be determined at this stage of the case. The Supreme Court of Illinois, in fact, recognized this, holding simply "that plaintiff has set forth facts, *which if proved true*, satisfy our special injury rule." Pet. 17a (emphasis added) (explaining that it could only consider "the allegations contained within the four corners of plaintiff's complaint"). For now, the procedural posture of the case dictates that CAN's allegations be taken as true.

Petitioners endeavor to resist the reality that this case is currently governed by the allegations of CAN's complaint by ignoring it. As such, petitioners' question presented simply presumes that the Supreme Court of Illinois swept conduct protected by the First Amendment within the ambit of malicious prosecution. Petitioners then try to bolster this

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[5] Petitioners' own case, *In re Primus*, 436 U.S. 412 (1978), at least implicitly acknowledges these limits, emphasizing the interests of "suitable litigants," *id.* at 431, pursuing "lawful means of vindicating legal rights," *id.* at 432.

sweeping assumption by presenting "facts" in their statement of the case that are wholly at odds with the allegations of the complaint. Most egregiously, petitioners, without citation to the record, assert that CAN has targeted Scientology as a cult and that in an effort to bring balance and fairness to CAN's educational efforts, a number of Scientology parishioners attempted to join CAN and then filed test cases challenging CAN's refusal to admit them as members. Pet. 3. This transparent and self-serving attempt to contradict the allegations of the complaint must be disregarded. *Bryson v. News America Publications, Inc.*, 177 Ill. 2d 77, 91, 672 N.E.2d 1207, 1216 (1996) (under Illinois law, in ruling on a motion to dismiss, the court "may consider only the allegations of the complaint * * * and may not consider other supporting material"). And once petitioners' effort to recast the factual allegations of the complaint in their favor is rejected, the assertion that the Supreme Court of Illinois defined its special damage rule to include First Amendment protected conduct rests on nothing more than petitioners' own *ipse dixit*. This cannot overcome the allegations of the complaint, which charge petitioners with filing vexatious lawsuits, not legitimate "test cases."

The First Amendment right of access to the courts is limited to litigants prosecuting meritorious actions. "[S]uits based on insubstantial claims * * * that lack * * * a 'reasonable basis' * * * *are not within the scope of First Amendment protection.*" *Bill Johnson's Restaurants*, 461 U.S. at 743 (emphasis added). As this Court explained,

> "The first amendment interests involved in private litigation — compensation for violated rights and interests, the psychological benefits of vindication, public airing of disputed facts — are not advanced when the litigation is based on intentional falsehoods or on knowingly frivolous claims. Furthermore, since sham litigation by definition

> does not involve a bona fide grievance, it does not come within the first amendment right to petition."

Ibid.

Other cases also have established the critical distinction between legitimate claims entitled to First Amendment protection and "sham" litigation that is not. *California Motor Transport* is particularly instructive in this regard. Like the instant case, that case involved allegations of "concerted action by petitioners to institute state and federal proceedings," 404 U.S. at 509, "with or without probable cause, and regardless of the merits of the cases," *id.* at 512, for the purpose of "putting their competitors, including plaintiff, out of business," *id.* at 511. These allegations, the Court found, fell in the category of unprotected litigation activity. As the Court explained, "a pattern of baseless, repetitive claims * * * [that] leads the factfinder to conclude that the administrative and judicial processes have been abused * * * cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'" *Id.* at 513.

Since *California Motor Transport*, this Court has reaffirmed that "repetitive lawsuits carrying the hallmark of insubstantial claims," *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973), and "private action that is not genuinely aimed at procuring favorable government action," *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 n.4 (1988), constitute unprotected "sham" litigation. And more recently, in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), this Court cited *California Motor Transport* with approval, explaining that the complaint in *California Motor Transport* "showed a sham not entitled to immunity," *id.* at 57, on the basis of its allegations concerning "the institution of legal proceedings 'without probable cause.'" *Id.* at 58.

Petitioners contend that *Professional Real Estate Investors* generally governs the scope of "First Amendment protections afforded a malicious prosecution defendant," Pet. 14, but that case is factually inapposite given the allegations of the complaint. *Professional Real Estate Investors*, as Judge Kozinski has explained, "provides a strict two-step analysis to assess whether a *single action* constitutes sham petitioning," which involves a "retrospective" inquiry into whether the suit had "objective merit." *USS-Posco Indus. v. Contra Costa County Building & Constr. Trades Council*, 31 F.3d 800, 810-11 (9th Cir. 1994) (emphasis added). *California Motor Transport*, by contrast, "deals with the case where the defendant is accused of bringing *a whole series of legal proceedings*," and requires a "prospective" inquiry into whether the "legal filings [were] made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment." *Id.* at 811 (emphasis added). Here, as in *USS-Posco Industries*, the allegations "track the language of *California Motor Transport*." *Ibid.* Indeed, this case presents a far stronger case on the merits than *USS-Posco Industries* because CAN's complaint alleges that all 21 of the underlying suits terminated in its favor, Pet. App. 11a-12a, whereas the underlying *plaintiffs* prevailed in 15 of the 29 suits in *USS-Posco Industries*. 31 F.3d at 811.

In sum, *California Motor Transport* plainly governs this case and renders petitioners' First Amendment defense wholly ineffectual at this stage of the proceedings. Under that case and the other decisions of this Court cited above, the First Amendment will not save petitioners from liability if CAN's allegations — that petitioners have instituted a series of legal proceedings, with malice and without probable cause, for the purpose of harassing and eliminating a competitor in the marketplace of ideas — are proven true. If, on the other hand, CAN fails to prove its allegations, the

First Amendment question raised in the instant petition will be moot. Accordingly, even if the jurisdictional and precedential barriers to a grant of certiorari were not present, there would be no reason for the Court to hear this case.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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